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Dear Mr. Lüeder,

I am aware that the Council of Ministers is meeting on Monday to discuss the position of the E.C. and its Member States on the latest WIPO draft non-paper (draft 1.0 March 8, 2007). At the TACD meeting this week your colleague suggested that it would be helpful if we could let you have our comments on the draft.

The draft claims to be based on the 'signal – based approach agreed by the General Assembly and the SCCR. However as there was no agreement as to what was meant by a 'signals based approach' the draft incorporates both an exclusive rights approach (rejected by some of the most powerful players at WIPO, the United States , Brazil and India) and a narrower and specific protection against signal theft.

As you acknowledged at the recent EU consultation, it is not politically possible to export the whole of the Community Acquis. It is therefore necessary to focus on an international Treaty which both protects against the claimed harm- signal theft- but also has the best chance of a successful conclusion.

As you know we are part of a coalition of NGO's and industry representatives who support a narrow signals based approach. Such an approach would combat signal piracy without the adverse effects of a broader rights based approach. We consider that the current draft fails in its aim to provide specific protection against signal theft, and, as currently worded goes beyond the protections necessary. Such broader rights will harm consumer interests. The coalition comments, with which we agree, have been sent to you under separate cover by Nick Aston Hart. This letter highlights some specific issues raised in the EU context

At the EU consultation hearing, three main issues were raised about our signals based approach. Before dealing with them first, let me say how useful I found the meeting, as it gave all parties an opportunity to discuss the issues in a constructive manner and allowed us to gain a better understanding of the Commission approach. I very much hope that it will be possible, as suggested, to hold another such meeting prior to the WIPO meeting in June.

The three issues were:

- 1) Pre broadcast Transmissions were not clearly covered. You will note that we have retained Article 9 on the protection of the pre- broadcast signals. This would provide

additional protection to the broadcasters as such protection is not included in the Community Acquis and in the Rome convention.

2) Post fixation rights were not covered. A scenario was presented where the signal for a live football match was stolen and retransmitted live over the Internet. Broadcasters want the right to sue for such retransmission. Technically when the signal is retransmitted over the Internet a fixation is made, so in order to have this right, the argument is made that protection needs to be extended to post fixation rights.

While no evidence of the extent of economic loss was presented at the consultation, even if it is accepted that such loss occurs, there is already a remedy. The copyright owner, who owns the copyright in the content, can sue. It was claimed that there was uncertainty as to whether such content would be covered by copyright. We have legal advice (which can be supplied) that shows that in both common law and civil law countries the requirements for fixation and originality would be met with modern camera angles and production techniques.

The broadcasters did not dispute that copyright applied, but claimed that they needed an individual right in addition to the rights of copyright holders because copyright holders may not sue. The example given was where a broadcaster bought sports rights from a sporting federation, the sporting federation may not choose to sue as they were already guaranteed payment from the broadcasters. However the broadcaster would lose the exclusivity purchased in the contract. This is a surprising assertion for broadcasters to make, because the remedy is already in their hands. To remedy this problem they simply need to insert an obligation in the contract, on the Sports Federation to assign its right to sue to the broadcasters. There is no failing or gap in international law, rather a failure of contractual negotiation. It does not require an International Treaty to fix this, it requires the broadcasters to employ better contract lawyers.

Even if they were technically unnecessary, post fixation rights may not matter if they were harmless but they are not. They would allow broadcasters to extend controls into consumers equipment and limit access

3) Should Simulcasting (the simultaneous retransmission by the broadcaster over the Internet e.g. a broadcast of a sports match on traditional TV and over the Internet) be included? Broadcasters claim that there would be a 'big hole' in the Treaty, if it only protected the broadcast signal but not the Internet one. Ideally they wanted parity, the same protection for both. Such arguments should be rejected. Firstly the protection is not needed as copyright can be used in the same for the Internet as for traditional broadcasting. Secondly, arguments for 'parity' gloss over a key difference, while the content may be the same (and protected by copyright,) the transmission system, the Internet, is different. This difference is crucial not just because it challenges the rationale for the original award of related rights (investment in transmission facilities) because also because the Internet is a dynamic and powerful force for promoting access to knowledge goods, and this is largely because it has been less regulated and freer than broadcast radio or television. The necessity for such differentiation between traditional

broadcasting regulation and online activities has been recognised in the recent review of the Television without Frontiers Directive.

As a result even an extension of traditional broadcasting protections to the Internet in the limited way suggested must be approached with caution. Policy makers must carefully consider the consequences of extending a regime designed for one platform to something completely different in character and tradition. We are not aware that the Commission has undertaken such an impact assessment. Nor is it likely to be politically acceptable, as you are aware the US has linked the question of simulcasting with webcasting, a subject so controversial that the SCCR agreed that consideration of webcasting and simulcasting should be dealt with in a separate discussion so that such impact assessment could be undertaken and the costs and benefits to all stakeholders, not just broadcasters could be considered. Seeking to reintroduce simulcasting would reopen this controversy and jeopardise any agreement on traditional broadcasting.

Why should EU Member States support our approach? There are economic, political and pragmatic reasons for so doing as detailed above. While the EU has for a long time advocated an 'EU' rights based approach at WIPO, politically, a treaty based upon the full European rights-based broadcasting model is simply not a viable option.

The benefit of accepting a signal-protection based instrument along the lines we're proposing could be it deals both with the practical problem of combating signal piracy and the political one of securing a consensus.

In summary, the choice European decision-makers must make is quite simple: If they believe that a multilateral instrument to protect against signal piracy is necessary, and that now is the time to conclude one, then it is also time to accept that a Rome Convention-plus – or even a Rome Convention-like – Instrument – is not something you can have.

If, however, European decision-makers do not believe that a non-rights-based, signal-only approach is acceptable, then in June at the second Special Session of the Standing Committee on Copyright and Related Rights, and at the WIPO General Assembly a few months later, Europe ought to join with other countries and admit that the time to conclude a treaty on this subject is not the present time, that ten years without an agreement means it is time to move on, returning to this subject at some later date.

Yours Sincerely

Michelle Childs
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